



California Fair Political Practices Commission

August 30, 1989

Diane Maybee
Rt. 2, Box 237CC
Oakley, CA 94561

Re: Your Request for Informal Assistance
Our File No. I-89-394

Dear Ms. Maybee:

This is in response to your request for advice regarding your responsibilities under the conflict-of-interest provisions of the Political Reform Act (the "Act").¹ Because your request is more of a general inquiry rather than a request for advice as to a specific action pending before you, we treat your request as one for informal assistance.²

QUESTION

1. May you participate in decisions regarding adoption of an environmental impact report for the Bethel Island unincorporated area?

2. May you participate in decisions regarding the adoption of a specific development plan for the Bethel Island unincorporated area?

CONCLUSION

1 and 2. You are prohibited from participating in decisions regarding the environmental impact report and the specific development plan for the Bethel Island area if such decisions would have a material financial effect on your real property interests or your real estate sales.

¹ Government Code Sections 81000-91015. All statutory references are to the Government Code unless otherwise indicated. Commission regulations appear at 2 California Code of Regulations Section 18000, et seq. All references to regulations are to Title 2, Division 6 of the California Code of Regulations.

² Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Government Code Section 83114; 2 Cal. Code of Regulations Section 18329(c)(3).)

FACTS

You are an appointed planning commissioner for the East County Regional Planning Commission in Contra Costa County. You also chair an advisory committee appointed to receive community input on the Bethel Island area specific plan. Additionally, you are a licensed real estate agent doing business in the Bethel Island area. We do not have sufficient facts to determine what kind of real estate you sell, nor do we know whether you have an investment interest in a real estate business in the Bethel Island area. Therefore, we discuss these issues in general terms.

The East County Regional Planning Commission is composed of nine commissioners, each appointed to represent the area of East Contra Costa County where he or she resides. Your residence is located on a one-acre parcel within the 6,500 acres commonly known as the Bethel Island unincorporated area. You have advised me that you estimate the population of Bethel Island at approximately 1,800 persons. The total population of East Contra Costa County includes the cities of Antioch and Pittsburg which have a combined population of approximately 69,000.

At the present time, the East County Regional Planning Commission is in the process of preparing a specific development plan for the Bethel Island unincorporated area. Adoption of a specific development plan may change land uses in the Bethel Island area.

Adoption of a specific development plan also requires the development of an environmental impact report. A hearing on a proposed environmental impact report is scheduled for the near future. The environmental impact report will determine the land use options available for the Bethel Island area because it will preclude certain uses while encouraging others.

You are concerned that, should you be required to disqualify from participating in these matters, you will be unable to represent the area you have been appointed to represent as a planning commissioner.

ANALYSIS

Section 87100 prohibits a public official from making, participating in, or using his or her official position to influence a governmental decision in which the official knows or has reason to know he or she has a financial interest. By making recommendations to the county board of supervisors, planning commissioners participate in the making of governmental decisions. (Regulation 18700(c)(2), copy enclosed.) Therefore, if a planning commissioner has a financial interest in one of the commission recommendations, he or she may not participate in that decision.

As a member of the planning commission, you will make recommendations to the county board of supervisors regarding the Bethel Island specific plan and adoption of the environmental impact

report. If you have a financial interest in any of the recommendations, you may not participate in the decisionmaking process.

An official has a financial interest in a decision if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official or a member of his or her immediate family or on:

(a) Any business entity in which the public official has a direct or indirect investment worth one thousand dollars (\$1,000) or more.

(b) Any real property in which the public official has a direct or indirect interest worth one thousand dollars (\$1,000) or more.

(c) Any source of income, other than gifts and other than loans by a commercial lending institution in the regular course of business on terms available to the public without regard to official status, aggregating two hundred fifty dollars (\$250) or more in value provided to, received by or promised to the public official within 12 months prior to the time when the decision is made.

(d) Any business entity in which the public official is a director, officer, partner, trustee, employee, or holds any position of management.

Section 87103(a)-(d).

We do not have sufficient information to determine whether you have an investment of \$1,000 or more in any business entity, such as a real estate business, in the Bethel Island area and therefore we do not address this issue. You do, however, have an investment in real property which we presume is worth more than \$1,000. Moreover, you are a licensed real estate agent and sell real estate in the Bethel Island area.

Decisions related to the future development of the Bethel Island unincorporated area may have a financial effect on your real property interests, or on real estate sales. For example, planned development may result in an increase in real property values as well as an increase in real estate sales. If your income is derived from commissions, each person who has purchased or sold real estate through you in the Bethel Island area is a disqualifying source of income to you if you have received \$250 or more from each source within the preceding 12 months. (Regulation 18704.3(c)(3)(B), copy enclosed.) Additionally, if you are an employee working for a real estate business, your employer is also a source of income to you if you have received any salary or commission from the business in excess of \$250 in the preceding 12 months. (Regulation 18704.3(c)(3)(A).)

If the effect of a decision on your real property, your real estate sales, or any of your sources of income is foreseeable and material, you must disqualify from participating in the decision.

Foreseeability

The effects of a decision are reasonably foreseeable if there is a substantial likelihood that they will occur. To be foreseeable, the effects of a decision must be more than a mere possibility; however, certainty is not required. (Downey Cares v. Downey Development Com. (1987) 196 Cal. App. 3d 983, 989-991; Witt v. Morrow (1977) 70 Cal. App. 3d 817, 822; In re Thorner (1975) 1 FPPC Ops. 198, copy enclosed.) The Act seeks to prevent more than conflicts of interest; it seeks to prevent even the appearance of a possible conflict of interest. (Witt v. Morrow, supra.)

As a planning commissioner, you will be called upon to make decisions pertaining to the environmental impact report and the area specific plan for Bethel Island. There is a substantial likelihood that one or more of the decisions to be made will have a financial effect on your real property interests or on your real estate sales. You have not indicated what type of development is under consideration. For purposes of clarification, however, we hypothesize that a decision to develop a marina is quite likely to increase the desirability of land in the adjacent areas. Also a decision to locate a major shopping center in the area is quite likely to have a positive effect on the value of real property. As stated before, if a decision would have a material financial effect on your interests, you must disqualify from participating in the decision.

Materiality

The Commission has adopted a series of regulations to determine whether a financial effect is material. The effect of a decision is material as to your real property if any of the following applies:

- (1) Your property is located within a 300-foot radius from the property which is the subject of a decision, unless the decision will have no financial effect upon your property;
- (2) The decision involves the construction of infrastructure improvements and your property will benefit from these improvements;
- (3) Your property is situated outside a radius of 300 feet but within 2,500 feet of the property which is the subject of the decision and the decision will increase or decrease the value of your property by \$10,000 or more. (Regulation 18702.3(a), copy enclosed.)

You own a one-acre parcel situated within Bethel Island. You also sell real estate in the area. Development of a specific plan will involve many subissues. For example, the plan may include traffic and housing components, location of infrastructure, provision of police and fire services and the like. As your commission deals with each of the subissues involved in the development of a specific plan, you must abstain from participating in each decision which will affect your interests as discussed above. Once a final decision has been reached as to the particular subissue, you may participate in the deliberations regarding other areas within the specific plan, so long as those deliberations do not result in a reopening of deliberations for the subissue which creates a disqualifying interest for you. (Huffaker Advice Letter, No. A-86-343, copy enclosed.)

For example, if the land within 300 feet of your real property is to be designated high density multifamily dwellings, you must abstain from participating in the decision unless you can show that this land designation will have no material financial effect upon your real property. However, if a similar designation is to be located within 2,500 feet of your property, you need only disqualify if the decision will have the effect of increasing or decreasing the value of your property by \$10,000 or more. Once each subissue of the specific plan and of the environmental impact report has been worked out, you need not abstain from participating in the final vote. (Marino Advice Letter, No. I-89-291, copy enclosed.)

The same is true of the adoption of an environmental impact report. The final report incorporates many subissues which are decided individually. For example, a component of an environmental impact report might deal with the air pollution caused by the location of some type of industry in the Bethel Island area. Another component might deal with the environmental stress caused by the development of necessary infrastructure. You must determine whether to abstain from participating in these decisions, depending on the facts, as each subissue comes before the commission for consideration.

Moreover, an increase or decrease in property values would foreseeably affect the commission income you receive. Regulation 18702.1(a)(4) provides that an increase or decrease of \$250 or more in an official's personal income in a year is considered material. Accordingly, you must disqualify yourself from any decision which could foreseeably result in a sufficient change in property values in Bethel Island that the commissions you receive would increase or decrease by \$250 or more in one year.

Additionally, if your source of income consists of commissions from your sale of real estate in Bethel Island, then you must disqualify from participating in decisions which would affect the interests of individuals who have been a source of commission or other type of income to you in excess of \$250 in the 12 months preceding a decision. Your sources of income would include your

clients. (Regulation 18704.3(c)(3), copy enclosed.) Furthermore, the full gross value of any commission income you receive for a specific transaction is attributed to each source of commission income in that transaction. (Regulation 18704.3(d); In re Carey (1977) 3 FPFC Ops. 99, copy enclosed.)

Public Generally Exception

Even if you ascertain that the effect of the decision will be material on your real property or your real estate sales, you may still be able to participate and vote if the effect on your real property and real estate sales is not distinguishable from the effect on the public generally. (Section 87103.) Regulation 18703 (copy enclosed) provides, in part:

A material financial effect of a governmental decision on an official's interests, as described in Government Code Section 87103, is distinguishable from its effect on the public generally unless the decision will affect the official's interest in substantially the same manner as it will affect all members of the public or a significant segment of the public.

For purposes of the Act, the "public" consists of all the persons residing, owning property, or doing business in the jurisdiction of the agency in question. (In re Legan (1985) 9 FPFC Ops 1, 15, copy enclosed.) In the case of the East County Regional Planning Commission, the public consists of all residents, property owners, and persons doing business in the East County. Consequently, for the public generally exception to apply, a decision would have to affect a significant segment of the East Contra Costa County area in substantially the same manner as it would affect you.

The Commission has never adopted a strict arithmetic test for determining what constitutes a significant segment of the public. However, in order to apply the public generally exception, the population affected must be large in number and heterogeneous in nature. (In re Ferraro (1978) 4 FPFC Ops. 62; Flynn Advice Letter, No. I-88-430, copies enclosed.)

In the Owen opinion (2 FPFC Ops. 77, copy enclosed) the Commission concluded that owners of single-family homes are a significant segment of the public. Therefore, if a decision to change a land use designation would affect most residential homeowners in the East County in substantially the same manner as it would affect you, you would be able to participate in the decision. Also, if the land use designation remains the same, we assume there will be no measurable financial effect on your property and you may participate in such decision. Conversely, for example, changes in land use designations on nearby property and changes in the traffic circulation element which might impact more

directly upon your real property are disqualifying. (Hopkins Advice Letter, No. A-88-151, copy enclosed.)

It appears that the decision to develop an area specific plan for Bethel Island and to approve an environmental impact report will not affect a large segment of the population of the East County in substantially the same manner as those decisions will affect your personal interests and those of your sources of income. Because you own real property and conduct real estate sales in the very area which is under consideration by the planning commission, your real property and business interests may be affected in a manner which is not substantially similar to the effect on other real property and businesses in the East County situated outside Bethel Island. For example, development of the Bethel Island area will have the effect of increasing the marketability of real property in the area thus increasing the value of your real property. Additionally, a material effect on your real estate sales is likely since development of Bethel Island may tend to increase or decrease real estate transactions. (See Jung Advice Letter, No. A-87-154; Galstan Advice Letter, No. I-88-144, copies enclosed.) Since the population of Bethel Island is only 1,800 and at least 69,000 persons reside in East Contra Costa County, we conclude that the "public generally" exception does not apply in this situation.

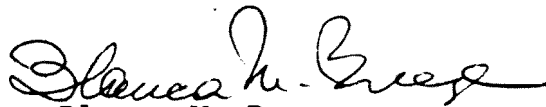
For all of the above reasons, you must disqualify from participating in any decision related to the Bethel Island area specific plan including consideration and approval of the environmental impact report if the decision will have a material financial effect on your real property or your real estate sales which is distinguishable from the effect on the public generally. Prior to making a determination on whether you are disqualified from participating in a decision, you should consult the attached regulations and determine your financial interest in the particular decision.

Notwithstanding the above, you may appear before the planning commission as a member of the general public to represent yourself on matters related solely to your personal interests. (Regulation 18700(d)(2).)

I trust this letter is responsive to your enquiry. Should you have any further questions regarding this matter, do not hesitate to call me at (916) 322-5901.

Sincerely,

Kathryn E. Donovan
General Counsel



By: Blanca M. Breeze
Counsel, Legal Division

KED:BMB:plh
Enclosures

June 28, 1989

Fair Political Practices Commission
Cathrin Donovan, General Counsel
P.O. Box 807
Sacramento, Ca. 95804

FPFC
JUL 3 9 41 AM '89

Attention: Lanka Breeze

Dear Ms. Breeze;

As per our conversation of Tuesday June 27th, I am asking for written advise, regarding a possible conflict of interest.

I am an appointed Planning Commissioner for the East County Regional Planning Commission, of Contra Costa County.

At the present time, we are in the process of a Specific Plan, EIR Hearing for the unincorporated area I represent.

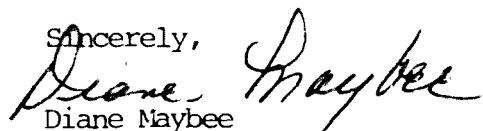
The project area consists of 6500 acres; I own and reside on a one acre parcel, in the study area.

County Counsel of Contra Costa County told me I have a Conflict of Interest, and that I should not participate, in the Hearing Process nor sit as a Planning Commissioner regarding the Bethel Island Specific Plan.

I am extremely concerned about a possible Conflict of Interest, and the ramifications it could represent to myself, and my fellow Commissioners in the event this should take place again.

As per our discussion, I am also a Licensed Real Estate Agent, and for over six months, the Chairman of the Advisory Committee that was appointed to have Community Input to the Bethel Island Area Specific Plan.

Your written interpretation, regarding this matter would be greatly appreciated.

Sincerely,

Diane Maybee

June 28, 1989

Fair Political Practices Commission
Cathrin Donovan, General Counsel
P.O. Box 807
Sacramento, Ca. 95804

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Sincerely,

Diane Maybee
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California Fair Political Practices Commission

July 6, 1989

Diane Maybee
Rt. 2 Box 237CC
Oakley, CA 94561

Re: Letter No. 89-394

Dear Ms. Maybee:

Your letter requesting advice under the Political Reform Act was received on July 3, 1989 by the Fair Political Practices Commission. If you have any questions about your advice request, you may contact Blanca Breeze an attorney in the Legal Division, directly at (916) 322-5901.

We try to answer all advice requests promptly. Therefore, unless your request poses particularly complex legal questions, or more information is needed, you should expect a response within 21 working days if your request seeks formal written advice. If more information is needed, the person assigned to prepare a response to your request will contact you shortly to advise you as to information needed. If your request is for informal assistance, we will answer it as quickly as we can. (See Commission Regulation 18329 (2 Cal. Code of Regs. Sec. 18329).)

You also should be aware that your letter and our response are public records which may be disclosed to the public upon receipt of a proper request for disclosure.

Very truly yours,

Kathryn E. Donovan
Kathryn E. Donovan
General Counsel

KED:plh